

# **WISCONSIN LEGISLATIVE COUNCIL STAFF**

## ***RULES CLEARINGHOUSE***

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## **CLEARINGHOUSE RULE 95-037**

### **Comments**

**[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]**

#### **1. Statutory Authority**

The board cites s. 977.02 (5), Stats., as authority for the rule. Under that provision, the board may promulgate rules establishing procedures to assure that representation of indigent clients by the private bar at the initial stages of cases assigned under ch. 977, Stats., is at the same level as the representation provided by the State Public Defender. While the board’s analysis indicates that the proposed limit on private attorney billable hours is equivalent to the hours worked per year for a full-time job, additional explanation regarding the rationale of the rule may assist in understanding how the rule is supported by the cited statutory authority and the statutes that the rule interprets. [See, also, s. 227.11 (2) (a), Stats.]

#### **2. Form, Style and Placement in Administrative Code**

a. In s. SPD 4.02, consideration should be given to replacing the underscored language with “subject to s. SPD 4.06.”

b. In s. SPD 4.06 (1), the notation “1)” should be replaced by the notation “(1).” Also, the phrase “This rule” should be replaced by the phrase “This subsection.”

c. In s. SPD 4.06 (2) and (3), the word “must” should be replaced by the word “shall.”

**5. Clarity, Grammar, Punctuation and Use of Plain Language**

a. Section SPD 4.03 (3) is amended to state that during an appeal, an attorney may negotiate a check for a reduced or denied payment without waiver of the right to appeal. What is the purpose of adding the underscored language to the current rule provision? Presumably, if payment has been denied, no check will exist.

b. The initial applicability of s. SPD 4.06 (1) is unclear. Does the cap first apply to billings for work performed in calendar year 1995; to billings for work performed at any time prior to the effective date of the rule that are submitted to the public defender in calendar year 1995; to work performed on cases assigned on or after the effective date of the rule; etc.? It appears the intent may be to subject any billings submitted to the public defender in calendar year 1995 to the proposed cap. If so, that intent should be stated more explicitly. If that is the intent, are any contract or other issues raised by the retroactive application of the new limitation?

c. Section SPD 4.06 (2) does not contain independent (express) authority for the board to grant advance approval if the board determines that exceptional circumstances justify payment for hours in excess of 2,080 hours.

d. In s. SPD 4.06 (3), “under s. SPD 4.03” may replace “pursuant to the procedures set forth in SPD 4.03.” “Such” should be replaced by “The.” The apparent standard to be used by the board in affirming or modifying the denied payment, “exceptional circumstances,” is not expressly stated either in s. SPD 4.06 (3) or in s. SPD 4.03. Is a later appeal permissible even if advance approval is denied under sub. (2)? As drafted, that would appear to be the case.